85-2076

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

NO.

in the Supreme Court of the United States

OCTOBER TERM, 1985

BERNARDO RODRIGUEZ,

Petitioner

vs.

UNITED STATES OF AMERICA

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF
FLORIDA MIAMI DIVISION

CASE NO. 84-132-Cr-SMA

UNITED STATES OF AMERICA
Plaintiff,

vs.

BERNARDO RODRIGUEZ,
Defendant

U.S. District Courthouse
Miami,Florida
Thursday, 9:31 a.m.
July 12, 1984

The above-entitled cause came on for Hearing on Motions before The Honorable SIDNEY M. ARONOVITZ, United States District Judge, pursuant to notice.

APPEARANCES:
(As herein announced.)

VOLUME 1

[EXCERPT PAGES 1-129 THROUGH 1-136]

THE COURT: This Court has considered the defendant's motion to suppress a photographic exhibit. No testimony was taken thereof because the defendant, prior to commencement of testimony, withdrew that motion.

The Court further then considered the matter of the defendant's motion to suppress the physical evidence seized at the premises at 778 Northwest 108th Street, Miami, Florida.

It appears to this Court, and the facts show, and the Court makes the following findings of fact and conclusions of law, which can be reduced to written form, if necessary:

On February 4, 1984, Special Agent of the ATF, Dennis Hamburger, approached the premises at 778 Northwest 108th Street, Miami, in unincorporated Dade County.

He went there for the purpose of

trying to ascertain whether he could serve an arrest warrant upon one Bernardo Rodriguez, the defendant in this case, which warrant had been issued by the United States Magistrate for an indictment previously returned against that defendant.

When he approached the premises, and while driving by, this special agent recognized an accomplice by the name of Payret, who was exiting the front gate of the premises, and who appeared on the same flyer which had been published to cause the arrest and seizure of this defendant.

The officer then prudently approached and arrested Payret on the warrant from Texas that was then outstanding, and after handcuffing him, learned upon inquiry that the Defendant Bernardo Rodriguez was inside the premises.

He also discovered that a young child in the front of the house, the front of the premises, was identified by Payret as Defendant Rodriguez' son.

He noted that the front door of the premises was open, and accordingly, he called for backup assistance to execute the arrest warrant on Bernardo Rodriguez.

Under all of the circumstances that were then present at the time and as known to Officer Hamburger, this Court finds that he had not only reasonable suspicion, but he had probable cause to believe that Bernardo Rodriguez was then within the subject premises.

When backup help arrived from the ATF and from Metropolitan Dade County Police, that was followed by the special response team of Metropolitan Dade County, Florida, ultimately and within thirty minutes of the first approach to

the house, at about 2:30 p.m., the premises had been surrounded and occupants of nearby homes had been evacuated in anticipation of the entry that might be necessary by reason of the loud speaker hailing by the ATF agents, which were for naught and for which the defendant did not respond.

There was a period of about a half an hour, from about 2:00 p.m. until 2:30, when the entire premises were not surrounded and during which time someone could have left the premises. The backup or special response team, did not arrive until about 4:00 p.m.

When it did so, the backup team prudently undertook, in a very highly professional manner, to make an entry solely and wholly for the purpose of serving the arrest warrant upon Bernardo Rodriguez, who was believed to be, with probable cause, within the subject

premises.

The initial entry was gained by the team. That team in accordance with standard operating procedure, made two sweeps of the premises; one the primary and the other secondary, designed to ascertain whether the subject was on the premises and to provide security against other people armed or otherwise being on the premises and constituting a possible danger to the entering officers.

In the course of those sweeps, and in plain view, several weapons were seen within the bedroom and in a closet and elsewhere within the premises.

Other items were seen. None of them were touched.

Thereupon, not finding the defendant within the premises, the officers continued their primary and secondary search by raising a ladder to the exterior of the wall of the house,

which had a metallic outlet covering a crawl space or attic area entryway.

The officers testified that the metallic grate was pushed in at the top, suggesting that it had been opened, or someone had pushed it into place, and they had, therefore, further reason and grounds to believe that someone may have been in the area involved.

Now, the Court accepts the testimony of the police officer who made the actual entry into crawl space, and that was Detective Steven Ellison of the Metro Police Special Team, that he made his entry and that he actually got into the craw space. I have no reason to doubt it. I have no reason to dispute it.

He has accurately described what was inside and in great detail has set forth the dimensions of the space within the crawl area, and there is no reason

to believe or to hold other than that the entry was for the purpose of ascertaining whether or not the defendant, or any other possible security risk, was hidden in that crawl space area, and at all times it is important to note that security is paramount in the very dangerous and delicate entries that are made by these special teams, particularly, and without adequate effort to protect against unknown and unexpected hazards, the risk is increased, obviously, substantially.

There is no reason why the Court, in this instance, should attempt to assert its judgment that the area in question at the time the search was made did not necessarily suggest or pose a circumstance in which someone, the defendant or some other person, could not have been hidden in it.

I do not think that the officers

who responded, under those circumstances, have to be bound by or restricted unduly in terms of that which is necessary in the performance of their duties, particularly where security risks are involved.

I'm simply saying that here, and under these circumstances, the entry was proper for the purposes, the intention, the intended purpose, the standard operating procedure that was exercised not only here but in other entries by this same team.

Now, thereafter, a search warrant was obtained. This search warrant, which is Defendant's Exhibit 6, is relevant here not as addressed to any of the weapons found within the interior of the premises in plain view, but as to those other items of evidence, if any, that were seized as a result of the search founded on the search warrant,

including some two-way radios and things like that.

Now, the Court finds that the affidavit for the search warrant is lawful, meets the requirements of law and is adequate, including its description of the residence to be searched.

In terms of a residence 778 Northwest 108th Street, Miami, Florida, the main house, which was the subject of the search, is the residence located at that address.

The other smaller building to the right is a converted garage into what appears to be intended for an apartment purpose, but not as a primary building on the premises.

The description used in the affidavit, and as appears in the search warrant, is adequate to sustain the search, therefore, that was made of the

primary premises, which, incidentally, also, apparently are the part of the premises appearing on the gate identified at 778 Northwest 108th Street.

With regard to the items, therefore, seized as a result of that search, other than the firearms within the interior of the house, I find that the search was lawful and made pursuant to and under a search warrant authorized by law.

I also find that with regard to the matter of the weapons that were removed from the crawl space or attic area, they were removed prior to the time that the search warrant was issued or obtained, and the Government is not contending or making any argument that they were properly seized on the basis of the search warrant.

I find that these items were in

plain view when the officer and other officers looked into the crawl space; that they constituted obvious contraband in the description of the guns and the description of the leafy substance, as well as the powder substance and, therefore, that the seizure was made of these items found in plain view.

Accordingly, the motion to suppress is denied as to all of the grounds and all of the evidence, and the same can be admitted.

I take note of the Government's reference to Payton versus New York, as well as the Spencer case and other cases cited in the Government's memorandum as being applicable here.

I do not feel that under the circumstances involved in this case, the mere fact that the entry to the crawl space or the attic space was exterior and not interior is sufficient to take

it outside the scope of a legally authorized search under the circumstances that prevailed here.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
FLORIDA

Docket No.: 84-132-Cr-SMA

United States vs.
Bernardo Rodriguez

JUDGMENT AND PROBATION/COMMITMENT ORDER

[EXCERPT]
***

There being a verdict of Guilty

Defendant has been convicted as charged of the offense(s) in violation of Title 18 USC, Section 922 (a)(6) & 924 (a), as to Cts: 1 and 2; Title 18, USC, Sections 922 (h)(1) & 924(a), as to Cts 3 and 4; Title 26 USC, Section 5861(d) & 5871, as To Cts. 5 and 6, Title 26, USC, 5861(1) & 5871, as to Cts. 7; Title 18 USC, (appendix 1) Section 1202(a) (1) as to Cts. 8,9,10,11,12,and 13.

***

The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS as to each of Counts 1, 2, 3, 4, said sentences are to run concurrently with each other.

ORDERED AND ADJUDGED that the Defendants shall serve a sentence of confinement of TWO (2) YEARS as to each of Counts 5, 6, 7 said sentences are to run concurrently with each other.. but consecutively to sentence imposed in Counts 1, 2, 3, 4.

ORDERED AND ADJUDGED that imposition of sentence of confinement shall be withheld and the Defendant be placed on probation as to each of Counts 9, 10, 11, 12, 13 for a period of FIVE (5) YEARS, said sentence shall run concurrently with each other and shall be served following period of

confinement. Sentence of probation shall be served under the Standing Conditions of Probation as defined by the Court's Order entered August 1, 1964.

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/S/
SIDNEY M. ARONOVITZ
Date: August 22, 1984

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 84-5765
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BERNARDO RODRIGUEZ,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(January 8, 1986)

Before FAY, JOHNSON and CLARK, Circuit Court Judges.

PER CURIAM: AFFIRMED. See Cir. R. 25.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5765

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BERNARDO RODRIGUEZ,

Defendant-Appellant

Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING
(February 20, 1986)

BEFORE: FAY, JOHNSON and CLARK

PER CURIAM

The petition(s) for rehearing filed by appellant is denied.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Appendix was mailed to the United States Attorney for the Southern District of Florida, 155 South Miami Avenue, Miami, Florida 33156, and that 3 true copies were mailed to the United States Solicitor General, Department of Justice, Room 5614, Washington, D.C. 20530, this 7 day of May, 1986.

BY: